

# *Advocacy Through the Eyes of the Trial Judge*

**Indiana Judicial Conference  
September, 2006**

# Voir Dire



# Losing a Case on Voir Dire Examination

- *This case is not complicated but the crucial evidence will come from the doctors and nurses who treated Tanya Brack. I imagine a few of you women on this jury at one time or another thought about being a nurse. And I'm sure there is a man or two among you who dreamed of becoming a doctor...*

## And, if that is not enough... *from the transcript*

- **Mr. \_\_\_\_:** *Now, before I sit down, is there any thing you would like to tell us or, after reflection, any question you may now want to answer?*
- **Mr. \_\_\_\_:** *Yes, Mrs. Thomas.*
- **Juror # 3:** *I don't like you and I am afraid I will hold this against your client.*
- **Mr. \_\_\_\_:** *Anybody else feel this way?*
- **The Panel:** Jurors # 2, 5 & 8 raise hands.

# The *Voir Dire* Process

- *“The function of voir dire examination is not to educate jurors, but to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence.”*  
Von Almen v. State, 496 N.E. 2d 55 Ind. 1986)
- Evid. R. 611
  - Discretion in how challenges are made.
  - Discretion on time limitations
  - Discretion of the Court’s Questioning

# Questioning the Panel

- Open-ended questions preferred
- Closed-ended questions – “*the lock*”
- General-broad questions (asking the entire panel)
- Request Judge’s assistance (sensitive issues)
- Excusing panel while questioning other potential juror(s)

# Proper Voir Dire Questions

- Elements of the offense in a crim. case
- The burden of proof
- Juror attitudes on type of offense or case
- Juror attitudes in general
- Questions relevant to jury service
- Questions relevant to impartiality
- Background/experience/family/education
- Not sure why but “sounds okay” questions

# Improper Voir Dire Questions

- Comment on inadmissible evidence
- Mention of case as being bifurcated
- Quoting excerpts from other cases
- Comment on sentence
- Misstating the elements of proof
- Conditioning questions

◦ *"We think this practice is repugnant to the cause of justice and should terminate."* *Robinson v. State*, 297 N.E. 2d 409 (1973)



# Opening Statements



# Opening Statement Transcript

## Civility???

- **Mr. Tarnow:** *“Mr. \_\_\_\_\_ has practiced law long enough to know right from wrong. I can’t believe he has attacked and ridiculed my client before you have heard the evidence. His snorts and chortels will continue. I know because I have tried cases against him. Don’t let his youthful bluster and negative attitude toward my client ...”*
- **Mr. \_\_\_:** *“Objection, your honor, I have had enough of this...”*
- **Judge:** *“Gentleman, please approach the bench.”*

# What is Permissible?

Is it fact?

(Most important for Court)

# The Dozen Don'ts

# Don't

- 1. Argue

- *“During this trial you will meet Mike Lubell. As you will learn, his past is such that his story may be called into question. In other words, pay attention to his testimony and you will conclude he is not a credible witness.” You decide if he can be trusted.”*

---

**Not Facts**

# Don't

- **2. Use table of characters**

*“During the Plaintiff’s case you will hear from Ted Najack, Bill Pullium, Sheila Davis, and Ronnie Parker. Each will discuss the employment atmosphere at AM General. Then you will meet Terry Myers and Robin Barr, two human resources experts. They will give their expert opinions on what the Defendant should have done when the complaints began.”*

- 2. Use table of characters
- 3. Give a course in trial procedure
- 4. Give a Disclaimer of Credibility
- 5. Overuse, “*the evidence will show*”
- 6. Address evidentiary uncertainty

# Don't

- 7. Engage in prohibited conduct
  - *“Bill Collins is my client’s CEO. I have known him for nearly twenty years. He is a decent, honest, hard-working family man.”*
  - *“If you were in my client’s position, you would have done the same thing.”*



# Don't

- 8. Make admissions that bind your client  
Conceding an element of the case
- 9. Appeal to passion or prejudice
- 10. Overstate (keep it simple)
- 11. Play off the other side's opening
- 12. Discuss law (unless bench trial)

# The Dozen Do's

# Do

- **1. Give theme (*permissible argument*)**

*“The cocaine chronicles”*

*“The word of a prostitute”*

*“The broken promise”*

*“A failure to communicate and a failure to resuscitate.”*

*“Experience v. Inexperience”*

*“Per the usual agreement”*

# Do

- 2. Tell the story
  - *Jury must **hear**, **believe** and **remember***
- 3. Create sense of injustice
- 4. Personalize your client
- 5. Give only necessary details

# Do

- 6. Make it simple

From a Highway Construction Case

*“The clear catastrophic consequences opined by a plethora of highway structural engineers is that the pitch of the incline effectuated an ingress and egress design that is indelibly problematic.”*

# Do

- 7. Start and End Strong
- 8. End Strong
- 9. Tell the jury what you want
- 10. Be cognizant of burden of boredom
- 11. Make yourself credible
- 12. Use Exhibits

# Objections

- Argument – on and on
- Violation of Court Order
- Ethics Violation
- Mischaracterization of the evidence
- ??????

# Direct Examination





# From a Direct Examination

- **Q.** *Where in the Bronco was the blood removed and what did you do with it after you showed it to Mr. Fong but before you took it to the laboratory?*

# DIRECT EXAMINATION

## *The Good Direct Includes*

- 1. The use of non-leading Questions  
*who, what, where, when, why, how,  
explain, describe...*

# DIRECT EXAMINATION

*Permissible to lead when*

- Foundational
- Preliminary

# From a Transcript

## Direct Examination

- **Mr. Esing:** *When you were at Al's with the Defendant you heard them discuss the possibility of robbing the bank?*
- **Ms. Dunn:** *Objection, Leading!*
- **Judge:** *Response!*
- **Mr. Esing:** *It is preliminary your honor.*
- **Judge:** *Preliminary to what!*
- **Mr. Esing:** *Um, preliminary to my next question?*

# DIRECT EXAMINATION

*Permissible to lead when*

- Foundational
- Preliminary
- Fact not in dispute
- Adverse witness
- Hostile witness
- Child witness
- Elderly witness

# DIRECT EXAMINATION

## The Good Direct Includes

- 2. Conversational Introduction of the witness

**Preferred** - *“Please introduce yourself?”*

**Preferred** - *“What is your name?”*

**Not preferred** - *“State your name for the record?”*

- 3. Establishing Witness Credibility (Ex)

# Failing to establish credibility

- **Pros.** *What is your name?*
  - **Wit.** *Sue Edison*
  - **Pros.** *Do you know the defendant?*
  - **Wit.** *Yes*
  - **Pros.** *Let me take you to the night of June 23, 2003. Were you with the defendant?*
  - **Wit.** *Yes*
  - **Pros.** *Where?*
  - **Wit.** *At John's house*
  - **Pros.** *Tell us all that happened that night?*
-

# DIRECT EXAMINATION

## The Good Direct Includes

- 4. Effective organization
  - chronological v. topical
  - Introduction
  - Establish credibility
  - Set the scene
  - Describe the action
  - Address weaknesses
  - Use of exhibits
  - Concluding questions –strong ending



# DIRECT EXAMINATION

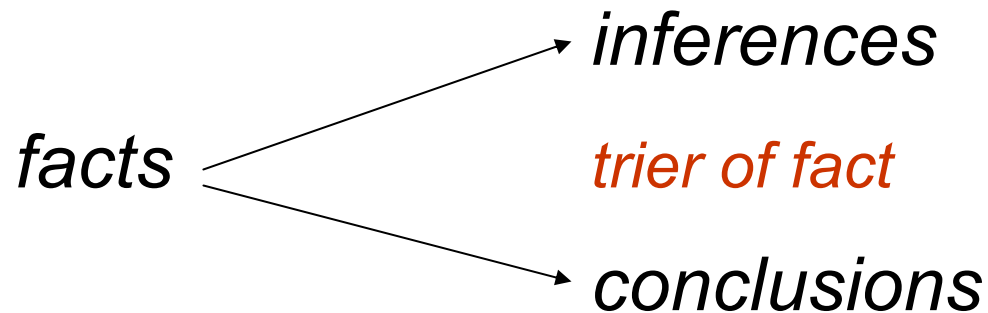
## The Good Direct Includes

- 5. Use simple language
  - *Q. What have the plethora of engineering studies indicating ingress and egress problems postulated with respect to the conundrum of problems?*
  - *Q. Explain what occurred after you exited your unmarked unit, approached the perp and withdrew your departmental issue?*

# DIRECT EXAMINATION

## The Good Direct Includes

- 6. Facts, not conclusions



## Fact Q's

**Q.** *Describe his appearance?*

**A.** He was messy & his eyes were bloodshot.

**Q.** *How was he walking?*

**A.** He staggered.

**Q.** *Describe his speech?*

**A.** He slurred his words.

## Conclusion Q

**Q.** *When you saw him come out of the store, what did you think?*

**A.** He was drunk.

# DIRECT EXAMINATION

## The Good Direct Includes

- 7. One fact per question

**Compound:** *“Describe what you saw, what you heard and what you did?”*

**One fact:**      What did you see  
                         What did you hear?  
                         What did you do?

# DIRECT EXAMINATION

## The Good Direct Includes

- 8. Headlining (the announcement)
  - *I want to ask you some questions about the day the contract was signed.*
  - *Please focus your attention on what happened when Mr. Dean called you to complain about the shipping terms in the contract.*
  - *Let's discuss what you did about shipping the computers after your conversation with Mr. Dean.*

# DIRECT EXAMINATION

## The Good Direct Includes

- 9. Involving the fact finder
  - Please *tell the jury* what he said to you?
  - Would you *tell the judge* what he did after signing the contract?
  - **Tell the court** what the officer said to you after you gave him your identification?

# The good direct includes

## 10. Use of the coupling technique

- **Q.** *How did Maria give him the drugs?*
- **A.** She threw them.
- **Q.** *What happened next?*
- **A.** She ran.
- **Q.** *What happened next?*
- **A.** She stumbled.
- **Q.** *What happened next?*
- **A.** She yelled for Ted.
- **Q.** *What happened next?*

—

- **Q.** *How did Maria give him the drugs?*
- **A.** She **threw them**.
- **Q.** After **throwing them** what happened?
- **A.** **She ran**.
- **Q.** After **she ran**, what did you see?

# DIRECT EXAMINATION

## The Good Direct Includes

- 11. Creating a visual image
- 12. Bringing out weaknesses
- 13. Listening to the witness answers

**Q.** *What is your name?*

**A.** Edward Alpaco, I'm a neuro surgeon.

**Q.** *What is your profession?*



# DIRECT EXAMINATION

## The Good Direct Includes

- 14. Avoiding Q's that call for a narrative
  - Objectionable – why?
- 15. Recognizing excludable evidence
- 16. Not interrupting the witness
- 17. A strong ending

# Is this a strong ending?

From a highway construction case

**Mr. Quinn:** *Finally, how did Hopkins Engineering support the girders?*

**Ms. Dawes:** Objection, lack of foundation.

**Judge:** Do you have a response?

**Mr. Quinn:** *Uhm, no need to judge.*

**Judge:** Objection is sustained.

**Mr. Quinn:** *No further questions, I pass the witness.*

# DIRECT EXAMINATION

## The Good Direct Includes

- 14. Avoiding Q's that call for a narrative
  - Objectionable – why?
- 15. Recognizing excludable evidence
- 16. Not interrupting the witness
- 17. A strong ending

# Cross Examination



# You Be The Judge

Q. You claim today you pointed out the glove to other officers?

A. Yes.

Q. You never put that in your report?

A. No.

Q. In your deposition you never said you pointed the glove out to other officers?

A. That's true sir.

# You Be The Judge

Q. Why didn't you tell me this?

A. You never asked me.

Q. There is no written verification of what you are now telling the jury?

A. Yes there is.

Q. Where?

A. Officer Collins wrote it in his report!

# Cross Examination

## A Good Cross Includes...

- 1. Use of leading questions
  - The question suggests the answer
  - Does not have to be in question form
  - Declarative statements are permissible

---

**Q.** *You went to the bank?*

**Q.** *You asked for Mr. Perez?*

**Q.** *He was surprised to see you?*

# Cross Examination

## A Good Cross Includes...

- 2. Topical organization where possible
- 3. Short Questions
- 4. Facts, not conclusions



## Facts, not Conclusions

## Conclusions Made

**Q.** *You examined the deed?*

**A.** Yes.

**Q.** *There was an encumbrance?*

**A.** Yes.

**Q.** *You didn't buy title insurance?*

**A.** That's correct

**Q.** *You examined the deed?*

**A.** Yes.

**Q.** *Despite there being an encumbrance, you didn't buy title ins?*

**A.** The seller told me he would talk to his neighbor about the easement and that...

# Cross Examination

## A Good Cross Includes...

- 5. Just one fact per question
- 6. No argument
- 7. Use of headlining
- 8. Avoiding over-use of tag lines (ex)

# Cross Examination

## A Good Cross Includes...

- 9. Use of impact areas

Q. *Officer Jade questioned you?*

A. Yes.

Q. *You didn't mention a sexual assault?*

A. That's true

Q. *At the hospital you spoke with 2 nurses?*

A. Yes.

Q. *You didn't mention a sexual assault?*

A. No.

Q. You talked with the doctor?

A. That's correct.

Q. *You didn't mention a sexual assault?*

A. No, I didn't

# Cross Examination

## A Good Cross Includes...

- 10. Proper control of the unresponsive witness
  - Repeat the question
  - Telling the witness the answer
  - Getting agreement from the witness
  - The directive
  - Ask the judge for help

# A Judges Approach to Control of the Unresponsive Witness

- From a transcript

Q. What did he say to you?

A. I was not interested in having him do anything that would affect our initial investigation into the threats that were allegedly made...

Court: Answer the damn question!

# Cross Examination

## A Good Cross Includes...

- 11. Avoiding Characterizations
- 12. Avoiding the use of “why” questions.
- 13. Avoiding “you testified” questions.
- 14. Adopting witness definitions
- 15. Evoking your theme
- 16. No repeating of direct examination.

# Cross Examination

## A Good Cross Includes...

- 17. Only asking Questions to which you know the answer
- 18. Being brief
  - outline the cross
  - be cognizant of the burden of boredom
- 19. Starting and ending strong

# Impeachment





# EFFECTIVE IMPEACHMENT

## Maintaining Control

- Avoid trivial impeachment
  - *Today you said the car was turquoise?*
  - *In your deposition you said the car was blue-green?*
- Don't inject recollection
  - *Do you recall saying the light was red?*
- Avoid the “why” question
  - *Why did you say something different today?*

# AREAS OF IMPEACHMENT

- Prior convictions
- Character Evidence
- Truth and veracity
- Perception or memory
- Omissions
- Bias
- Prejudice
- interest
- Improper motive
- Prior inconsistent statements

# IMPEACHMENT

## Prior Inconsistent Statements

- **Commit**

*“today you claim the light was red...”*

- **Credit**

*deposition, statement, police report, etc.*

- **Confront**

*“on page 3 you said the light was green...”*

- **Contrast (court's discretion)**

*“today you said red but in depo you said green”*

# IMPEACHMENT

## OMISSIONS

- Important evidence volunteered by witness on Direct Examination
- Not in document
- It would matter to the try of fact

## PRIOR CONVICTION

- Offense committed
- Date of conviction

# Re-Direct Examination



# Re-Direct Examination

## *The Rules*

- The key words  
*“why...explain...describe”*
- Don't repeat direct examination
- No leading questions
- Cover only necessary points
- Be brief

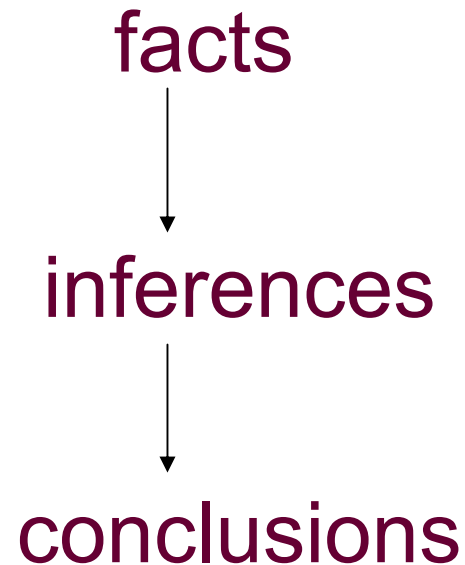
# Closing Argument



# CLOSING ARGUMENT

## *The Fundamentals*

### 1. Argument, not summation (ex)





## Summation

### Conclusion

- When Mr. Collins did not tell the bank he had a partner he engaged in deception.

## Argument

### Fact-Inference-Conclusion

- **(fact)** When the Bank Director asked Mr. Collins if he had a partner, Collins said “no.” When the Commercial loan officer asked him if he had a partner, Collins said “no.” During trial we learned that Adamson was in fact his partner. **(inference)** Collins misled the bank. **(conclusion)** Members of the jury, this is deception.

# CLOSING ARGUMENT

## *The Fundamentals*

### 2. Begin and End Strong

# Compare the start of these Closing Arguments

- He was driven by greed and power. And when he had all the power and all the money, he wanted more. Yes, we are talking about David Childs, CEO of Exel Corporation.
- This has been a long trial and throughout, you have been extremely attentive. You demonstrated a seriousness of purpose. Exel Corporation is pleased and honored to have you hear the baseless allegations made against them.

# CLOSING ARGUMENT

## *The Fundamentals*

3. Address theory and theme of case
4. Do not read
5. Set out the issues persuasively (ex)

# State issues persuasively

## From an arbitration

- “Whether or not the judgment of the High Court of Justice of England and Wales is enforceable in New York?”
- “With the English Court having no jurisdiction over A-Z International, Inc., can you, as Arbiter, now accept the English Court’s Judgment?”

# CLOSING ARGUMENT

## *The Fundamentals*

### 6. Use Final Instructions persuasively (ex)

*“When we complete our arguments the Judge will read you instructions to assist you during your deliberations. **I believe she will tell you** that the actions of a corporate officer may not be attributed to other corporate officers unless there is sufficient evidence to show knowledge and complicity by the other officers.”*

# CLOSING ARGUMENT

## *The Fundamentals*

### 7. Use of Rhetorical questions technique (ex)

- Ask yourselves, “*why would they pick up the trash?*”

: *Pause*

: *Answer*

- *At some point during your deliberations we ask that you ask yourselves a question followed by one minute of silence where each of you, individually, and without discussion, thinks about the answer. The question is, “why was it so important for Continental Insurance to quickly unload the risk of explosion to Lloyds? After you have thought about the answer, please discuss it openly.”*

# CLOSING ARGUMENT

## *The Fundamentals*

### 8. Use outline approach to oral communication (ex)

*: “there are 3 facts essential in making your determination and they are as follows...”*

1. \_\_\_\_\_ 2. \_\_\_\_\_ and  
3. \_\_\_\_\_

*: “I will now discuss each issue specifically, first...”*



# CLOSING ARGUMENT

## *The Fundamentals*

- 9. Base credibility challenge on facts
- 10. Do not degrade opposing counsel  
(ex)

*“Mr. Thompkins, to say the least, has represented his client with an aggressive arrogance that I have never encountered in a courtroom. He is a master of what politicians call, spin.”*

# CLOSING ARGUMENT

## *The Fundamentals*

11. Engage in controlled use of exhibits
12. Address weaknesses
13. Tell jury what you want
  - Be clear – use “verdict forms”
  - Justify, justify, justify
  - Relate to Instructions
14. Address burden of proof (Ex)

# Compare Addressing Burden of Proof in Final Argument

- “The judge will tell you that our burden of proof in this case is a *preponderance of evidence*. That means we only have to prove by a *preponderance of evidence* that Mr. Collins was deceptive.”
- “We have a burden that must be met if we are to win this case. That burden is called a preponderance of evidence. This means, if the evidence shows that it was more likely than not that the Defendant’s running the red light caused the accident, you must find for Ms. Bly and award her damages.”

# CLOSING ARGUMENT

## *The Fundamentals*

### 15. Use effective style

- Eye contact
- Movement with a purpose
- Hand positions
- Use of note pads
- Respecting space

### 16. Use objections sparingly

# Tools of Evidence



# TRUE OR FALSE?

- An accident reconstruction expert may opine, *“the defendant was negligent in that he crossed the center line.”*
- The court may limit a lawyer’s direct examination to 20 minutes.
- During cross examination a lawyer clearly goes of direct and there is a proper objection. The judge may allow the cross examiner to go beyond the scope.

# TRUE OR FALSE?

- A lay witness may give an opinion that “the defendant was drunk when he signed the contract.”
- After properly refreshing a witnesses with a document, the lawyer offers it into evidence. The judge may admit the document.
- During the Defendant’s portion of an Employment Discrimination case the Defendant’s lawyer says: *“Judge, instead of calling my client’s Human Resources Director as a witness I have obtained an affidavit from her that lays the foundation for Plaintiff’s personnel file. We now hand you the affidavit and offer the personnel file as Exhibit 45.”* Plaintiff’s counsel objects. The court can overrule the objection.

# Judicial Discretion under the Rules of Evidence

- May a Judge, without an objection, order a lawyer to cease eliciting evidence on a certain issue because in the judge's words, "he and the jury have heard enough."

- From a Transcript

**Q.** *Tell us what you did from the time you received the particles at the reactor until you brought them to court today?*

**OBJ.** *Objection Judge, the question calls for a narrative.*

**Ruling?**



# Control by Court - 611

- Number of Witnesses
- Harassment
- Time constraints
- Narratives
- Limiting cumulative testimony



# TOOLS FOR MAKING THE RECORD



# *Objections- 103 (a)*

- Must be specific – “*Objection, relevance!*”
- Must be timely
- Argument at bench (preferred)
- If as the proponent of the question you have a response, ask the court for permission to respond.

# The Rule

## Objections - 103 (a)

- Must be specific – “*Objection, relevance!*”  
*Mr. Collins: Tell the jury how your injuries effected you daughter?*  
*Ms. Poolen: Objection*  
*Court: Sustained*
- Must be timely
- Argument at the bench preferred
- If as the questioner you have a response, ask the court for permission to respond. *Respond with confidence*

# ***Motion To Strike - 103 (1)***

- Proper question followed by improper testimony
- Evidence admitted but failure to “connect-up”
- Inappropriate comments of counsel
- Witness unresponsive in answering question and there is an objection/Motion to Strike

# *Judicial Notice - 201*

- A *fact* generally known w/in jurisdiction
- Or, capable of certain *verification*
- Court may take notice whether requested or not
- If a proper request is made, it is mandatory for the court to take

# Offer of Proof – 103 (2)

## Question - *Objection* - Sustained

- “*Your honor, may I make an offer of proof*”
- Out of the presence of jury
- Three ways to make offer
  - :At bench, “*your honor if the witness were allowed to answer she would say...*”
  - :Questioning witness
  - :In writing
- Request for reconsideration

# *Refreshing Recollection - 612*

- Establish witnesses failure of memory
- Show witness refreshing document
- Ask witness to read it to herself
- Ask if memory refreshed as to forgotten fact
- Take refreshing exhibit from witness
- Re-ask question



# *Summary - 1006*

- Records voluminous
- Underlying records need to be admissible
- Records available to opposing counsel

# *Court Not Bound By Rules*

## *R. 104 (a)*

- In matters involving preliminary questions concerning a persons qualifications to be a witness
- Building certain foundations for the admissibility of evidence

---

**\*The Affidavit**

# **TESTIMONIAL EVIDENCE- WITNESSES**

# Lay Opinion - 701

- Rationally based on perception
  - Helpful in understanding a fact in issue
- 

- Prohibits
  1. Speculation
  2. Conjecture
  3. Legal Conclusions

# Expert Testimony

## Plaintiff's Lawyer:

*"Is that your conclusion, that this man is a malingerer?"*

## Psychiatrist:

*"I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post-traumatic condition."*

- (Ladner v. Higgins, 71 So.2d 242, 244 (La. Ct. App. 1954))

# Expert Testimony

Q: How long would it take for a sphincter spasm to heal, Doctor?

A: Sphincter spasm is not a disease process. I mean, as you stand there, you can have sphincter spasm if you wanted to.

Q: I could have a sphincter spasm right now if I wanted to?

A: Just tighten your sphincter and that is your sphincter spasm. Try it.

Q: Can you have one right now?

A: Yea, I think we all can.

# Expert Testimony

- Expert Opinion – *R. 702, 703, 705*

*:Rule 702 – skill, training, education, experience (scientific, technical or other specialized knowledge)*

*:Rule 703 – “reasonably relied upon by others*

*:Rule 705 - “opinion before basis”*

# Indiana Evidence Rule 702 (b)

- Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are **reliable**



# Daubert...a bear of a problem



# Daubert Factors

- whether the theory or methodology “can be (and has been) tested”
- “whether the theory or technique has been subjected to peer review and publication”
- whether theory or method has a “known or potential rate of error”
- whether the theory or method has acquired “general acceptance in the scientific community”

# *Steward v. State*

- “...the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying *Rule 702 (b)*.”
- “*Daubert* notes the importance of a valid scientific connection *to the pertinent inquiry* as a pre condition to admissibility.”

# *Harrison v. State*

- “...without conducting any **pre-trial inquiry** ...the trial court ran serious risks of violating important evidentiary principles.”
- Proper attention must be given to determine if the expert is properly qualified.
- Expert evidence can be both powerful and quite misleading – **Rule 403 analysis**

# OPINION ON ULTIMATE ISSUE

## *Rule 704*

- “Testimony in the form of an opinion...not objectionable merely because it embraces the ultimate issue...”

---

Ultimate issue of fact, not law!

# Are these proper expert opinions on the ultimate issue?

- *“In my opinion the letter contains an acceptance of the offer.”*
- *“In my opinion the covenant not to compete was a part of the employment agreement.”*
- *“The defendant crossed the center line which caused the collision.”*

Relevance

# Relevance

- 401 - Probative value – tendency to make material fact more or less likely
- 403 – **Unfair** prejudice **substantially** outweighs probative value



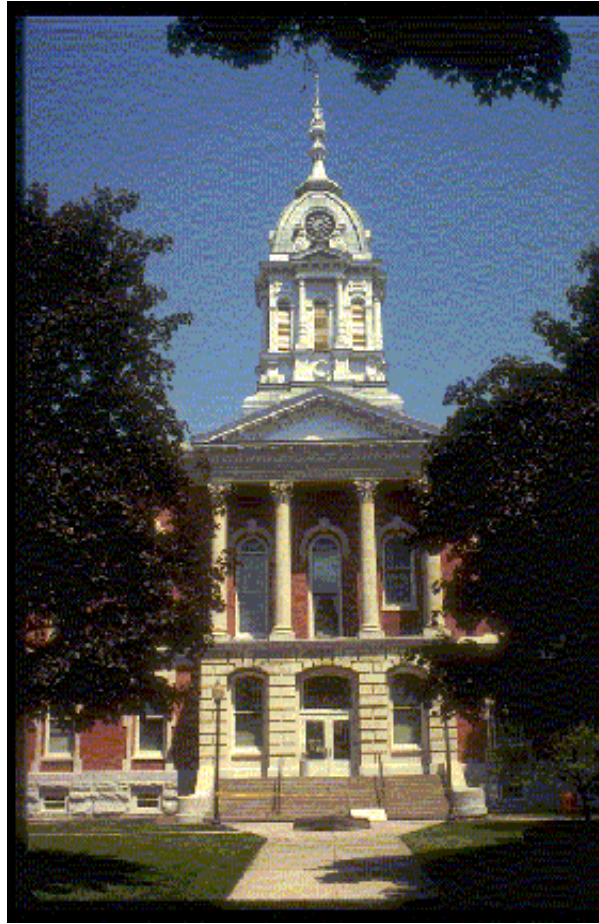
# Degrees of Admissibility

- Conditional – 104(b) “*the connect-up rule*”
- Limited – 105 “*used for limited purpose*”
- Contextual – 106 “*rule of completeness*”

# Specific Matters Relating To Admissibility

- Habit and Routine Practice - 406
- Subsequent Remedial Measures - 407
- Compromise/offers of compromise - 408
- Payment of medical/similar expense - 409
- Guilty pleas and offers of pleas - 410
- Liability Insurance - 411

# Exhibits



# Exhibit Foundation Requirements

- **B** Best Evidence
- **A** Authentication
- **R** Relevant
- **P** Not privileged
- **H** Not Hearsay
- **O** Original
- **P** Not Privileged
- **R** Relevant
- **A** Authentication
- **H** Not Hearsay

# Types of Exhibits

- Writings
- Illustrative

*“...will evidence assist you in explaining your testimony to the jury”*
- Demonstrative

*“...is evidence a true and accurate representation of...”*
- Tangible Objects

*“...is it in the same or similar condition...”*

# Exhibit Mantra

- 1. *May I approach?*
- 2. Show to opposing Counsel
- 3. *I hand you (an item, a document, a photograph, marked for identification as Defendant's Ex. #1.*
- 4. *What is it? / Do you recognize it?*
- 5. Establish Relevance (often several ?'s)
- 6. The legal buzz words (foundation for writing, illustrative, demonstrative or tangible exhibit)
- 7. *Defendant offers Exhibit 1.*



# Hearsay



# Hearsay - 801

- Out-of-court statement offered for its truth
- *“Jim told me he signed the contract without making any changes.”*
- *“I signed the contract without making any changes.”*
- *“Jim told me the contract would be signed at the bank so I went to the bank.”*



# Hearsay Analysis

- - : not offered for truth
  - : non-hearsay 801(d)
    - :under oath
  - previous
    - :*prior consistent statement.*
    - :Identity
    - :*stat. of party opp.*
    - :stat. by agent
    - :stat by co-consp.
- - : exception 803
    - :*present sense imp.*
    - :excited utterance
    - :*existing mental cond.*
    - :med. diag. or treat.
    - :*recorded rec.*
    - :business records
    - :*learned treatises*
    - :16 more

# Hearsay Exceptions - 803

- Present sense impression – 803(1)  
*statement made at or near the time perceived*
- Excited utterance – 803(2)  
*made while under stress or excitement from startling event*

# Hearsay Exceptions - 803

- Then existing mental, emotional, or physical condition – 803 (3)  
*statement made by declarant about their present condition (state of mind)*
- Statements for purposes of medical diagnosis or treatment – 803(4)  
*statement from declarant to medical provider*

# Hearsay Exceptions -803

- Past Recollection Recorded – 803(5)

*:witness lacks recollection but once had knowledge and there is a writing created or adopted by witness at a time when matter was fresh that will help recollection.*

*:witness may read from document*

*:writing cannot be offered into evidence*

# Hearsay Exceptions - 803

- Business Records 803(6)
  - 1) Writing or memoranda
  - 2) Made at or near the time
  - 3) By a person with knowledge
  - 4) Made in the regular course of business
  - 5) Kept in the course of regular business practice

# Hearsay Exceptions

- Learned Treatises – 803(18)
  - 1) A book or article
  - 2) Established as reliable authority
  - 3) Cross examine/relied upon in direct

# *Advocacy Through the Eyes of the Trial Judge*

**Indiana Judicial Conference  
September, 2006**